



## **FEDERAL IDR PROCESS**

The United States Departments of Labor, Health and Human Services, and the Treasury (the “Departments”) have issued a proposed rule that would affect the fees associated with the Federal independent dispute resolution (“IDR”) process under the No Surprises Act. The proposed rule reflects changes required by an adverse ruling in a federal district court case from the Eastern District of Texas, which we featured in our August 2023 issue, and can be read here. See *Texas Medical Association et al v. United States Department of Health and Human Services et al*, Docket No. 6:23-cv-00059 (E.D. Tex. Jan 30, 2023), Court Docket. There, the Court held that a previously issued Fee Guidance was substantive guidance as opposed to interpretative guidance, and as such, required a notice and comment period under the Administrative Procedure Act.

Essentially, the proposed rule would amend existing regulations by establishing that both the administrative fees charged by the Departments and the ranges for certified IDR entity fees for single and batched determinations will be set by the Departments via the notice and comment rulemaking process. The proposed rule would also establish methodologies used to calculate those fees. Finally, for disputes initiated on or after the later of the effective date of the proposed rule or January 1, 2024, the administrative fee will be \$150 per party per dispute, and this amount would remain in effect until subsequent notice and rulemaking takes place. The Departments aver that this arrangement will allow the flexibility to alter the fee more or less frequently than annually. For certified IDR entity fee ranges in disputes initiated on or after the later of the effective date of the proposed rules or January 1, 2024, certified IDR entities could charge a fixed certified IDR entity fee for single determinations between \$200 and \$840, and for batched determinations, between \$268 and \$1,173. The proposed rule provides that these fee ranges will remain in effect until new ranges are changed by subsequent notice and comment rulemaking.

A summary and full copy of the proposed rule, as well as information about how to submit a comment on the rules may be accessed [here](#). Comments are due by October 26, 2023.

## **MEDICAL PROVIDER CANNOT SUE ON BEHALF OF PARTICIPANT UNDER ERISA**

A medical provider cannot sue a benefits plan on behalf of a plan participant, according to a decision from the United States District Court for the Northern District of Illinois. The Court granted defendants SEIU Healthcare IL Personal Assistants Health Plan’s (the “Plan”) and its Board of Trustees’ motion to dismiss the ruling that medical

provider OSF Healthcare Saint Anthony Medical Center (“OSF”) did not have standing to enforce a patient’s rights because OSF is neither a “participant” nor a “beneficiary” under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”).

The patient was a participant in the Plan and originally sought medical treatment from a Plan in-network provider. However, the in-network provider did not offer the particular treatment she needed, so the provider referred her to OSF. The participant was unaware that OSF was out-of-network, and as a result, after receiving treatment, she was faced with an unexpected pricey medical bill. In fact, OSF billed the Plan \$78,448.60 for the treatment and the Plan only paid \$9,847.14. The participant filed an appeal with the Plan for the remainder of the bill, but the Plan denied her appeal. Following the appeal denial, the participant appointed OSF as her personal representative to sue the Plan for the balance of her medical bill. After filing the suit, OSF requested relevant administrative documents from the Plan, but the Plan refused to provide them until a court ordered it to.

OSF sued the Plan seeking (1) recovery of benefits for services rendered under § 1132(a)(1)(B) which provides that a “. . . civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan [or] to enforce his rights under the terms of the plan . . .”; and (2) redress for a violation of § 1132(c)(1)(B), which requires plan administrators to provide documents to a beneficiary or participant within thirty (30) days of a request. The Plan argued that as an authorized representative, OSF did not have standing because it was neither a beneficiary nor a participant in the Plan. Further, OSF could not sue on the participant’s behalf because ERISA contains an antiassignment provision explicitly prohibiting third parties from enforcing the rights of participants. In response, OSF argued that it was “standing in the shoes” of the participant, and that it was thus entitled to invoke her standing.

The Court agreed with the Plan, stating that “if Congress intended to allow an authorized representative to bring suit under § 1132 of ERISA, it would have done so in the ERISA statute.” Moreover, the regulations governing ERISA expressly allow representatives to file *internal* claims and appeals, whereas Congress explicitly limited civil actions to beneficiaries or participants. The Court further held that, even if the statute allowed representatives to bring civil actions on behalf of participants or beneficiaries, OSF did not plausibly allege that the Plan’s governing document would allow for such an arrangement. This is so because the Plan document contained its own anti-assignment language. The decision did not address the Plan’s refusal to timely provide documents to OSF.

### **IRS AND TREASURY PRIORITY GUIDANCE MAY NOT ALIGN WITH BENEFITS COMMUNITY EXPECTATIONS**

On September 29, 2023, the Department of Treasury and the Internal Revenue Service (the “Agencies”) issued their 2023-2024 Priority Guidance Plan (“Plan”) covering the period of July 1, 2023 through June 30, 2024. Although the Plan is

published on a yearly basis, due to the enactment of the SECURE 2.0 Act of 2022 (“SECURE 2.0”) last December, the 2023-2024 Plan has been greatly anticipated by the benefits community, which expected the Agencies to include an array of regulations addressing many of the provisions impacting retirement plans embedded in SECURE 2.0.

However, while the published Plan lists 237 projects with at least 22 items affecting retirement benefits, only three items appear to specifically address SECURE 2.0 provisions. Further, guidance for two of the three listed items was already released before September 29, 2023. The first released guidance item refers to certain relief with respect to (1) distributions made between January 1 and July 31, 2023 to those attaining age 72 in 2023 and (2) those who inherited an account after 2019 from an individual who was receiving required minimum distributions and would have been required to take a distribution in 2023. Please click [here](#) to see our August Employee Benefits In Focus for a detailed explanation of this part of the guidance. The second released guidance item refers to the 2-year delay in the effective date of the new section 414(v)(7) of the Internal Revenue Code, requiring that effective January 1, 2024, eligible individuals (*i.e.*, those with wages of \$145,000 or more) must make their catch-up contributions on a Roth (*i.e.*, after-tax) basis. Please click [here](#) to see our September Employee Benefits In Focus for a detailed explanation of the guidance.

The third guidance item, which is yet to be released, is listed in the Plan as “Regulations and other guidance relating to modifications to certain rules governing §401(k) plans made by the SECURE Act and the SECURE 2.0 Act” which, as the title suggests, is expected to address much awaited guidance on surviving spouse election to be treated as the Employee, treasury guidance on rollovers, and expansion of the Employee Plans Compliance Resolution System to allow more types of errors to be self-corrected. However, until the third guidance item is released there are no guarantees of what SECURE 2.0 provisions the Agencies consider priority requiring addressing.

## **A FEW REMINDERS** **(Based on calendar-year plans)**

These reminders are for informational purposes only and are not intended to replace your regular compliance calendar as they do not include all deadlines that may be applicable to your plan.

### **OCTOBER**

#### **ALL PLANS**

##### **€ Form 5500 Extended Deadline**

- October 16, 2023 is the date by which the Form 5500 for the 2022 plan year is due if a Form 5558 extending the due date was filed (while the due date is technically October 15, 2023, because it falls on a Sunday, the due date is automatically extended to the next business day).

## **€ Form 8955-SSA Extended Deadline**

- October 16, 2023 is the due date for Form 8955-SSA and participant statements for the 2022 plan year if a Form 5558 extending the due date was filed (while the due date is technically October 15, 2023, because it falls on a Sunday, the due date is automatically extended to the next business day).

## **DEFINED BENEFIT PLANS**

### **€ Third Quarter Contributions**

- October 15, 2023 is the deadline for third quarter contributions.

### **€ Retroactive Amendment to Correct Prior Year Coverage/Nondiscrimination**

#### **Failures**

- October 15, 2023 is the deadline by which to make a retroactive amendment to correct prior year coverage/nondiscrimination failures.

### **€ Pension Benefit Guaranty Corporation (“PBGC”) Premium Filing and Payment**

- October 16, 2023 is the deadline by which to file the prescribed premium information and pay the premium due in accordance with PBGC’s Premium Regulations and instructions (while the due date is technically October 15, 2023, because it falls on a Sunday, the due date is automatically extended to the next business day).

### **€ PBGC Form 200**

- October 26, 2023 is the last day by which to file the PBGC Form 200 if a plan sponsor did not make the October 16, 2023 required contribution and the total amount in unpaid contributions (including interest) exceeds \$1 million.

## **DEFINED CONTRIBUTION PLANS**

### **€ Notice of Intent to Use section 401(k) and section 401(m) Safe-Harbor**

#### **Formula (if plan is a “safe-harbor” 401(k) plan)**

- October 2, 2023 is the earliest date by which to send safe harbor notices for 401(k)/401(m) nondiscrimination safe harbor plans and plans with eligible automatic contribution arrangements.

### **€ Retroactive Amendment to Correct Prior Year Coverage/Nondiscrimination**

#### **Failures**

- October 15, 2023 is the deadline by which to make a retroactive amendment to correct prior year coverage/nondiscrimination failures.

## **NOVEMBER**

### **DEFINED BENEFIT PLANS**

#### **€      PBGC Form 10**

November 15, 2023 is the deadline by which to file the Form 10 if the defined benefit plan 1) has more than 100 participants, 2) missed its October 17 required contribution and the contribution remains unpaid as of November 15, 3) could not have satisfied the contribution by a Prefunding or Carryover Balance election and 4) had not filed a PBGC Form 200 for the same incident.